Missouri Law Review

Volume 28
Issue 4 *Fall 1963*

Article 3

1963

Insurance

John C. Tindel

INSURANCE*

JOHN C. TINDEL**

There are probably few lawyers who do not know of instances of automobile accidents in which the party at fault had no liability insurance and few assets, leaving the innocent party virtually uncompensated for loss and injuries. The development of unsatisfied judgment or uninsured motorist coverage appears to offer a solution to this problem. However, this type of coverage has not yet been interpreted by the courts. In *State ex rel. State Farm Mutual Auto Ins. Co. v. Craig*,[1] the Springfield Court of Appeals was faced with such a problem. The insurance company sought to intervene in a damage action against an uninsured motorist, brought by one of its policyholders who had this type of coverage. State Farm had attempted to provide ground rules to cover this situation. First, the policy had provided that the determination of whether the insured was legally entitled to recover against the uninsured driver and, if so, the amount of damages, would be made by agreement between the company and the insured or, in the event they failed to agree, by arbitration. Second, an exclusion clause provided that the policy would not apply if the insured settled with the uninsured driver or recovered a judgment against him without written consent of the company. Both of these provisions were virtually eliminated by the court. The arbitration provision fell within the province of § 435.010, RSMo 1959, which makes an arbitration provision no bar to litigation. The court also noted the familiar doctrine that contract provisions cannot oust a court of jurisdiction as to a determination of liability, even in the absence of statute.

The consent requirement was disposed of as being against public policy, requiring, in effect, the consent of the adverse party before bringing suit. No authority was cited on this point.

Beyond these points any effort to read the case for future guidance becomes difficult because the court insists that this case is decided only on

---

*This article contains a discussion of selected Missouri court decisions reported in volumes 357 through 368 of South Western Reporter, Second Series.

**Attorney, Nevada, Missouri; A.B. 1956; LL.B. 1963, University of Missouri.

1. 364 S.W.2d 343 (Spr. Mo. App. 1963).

its facts and is not to be applied to other cases. But one very clear problem area emerges. The court, after emphasizing that on the facts in this *case* the company does not have to defend the insured on a counterclaim, points out, "We see no conflict of interest or position."[2] The question immediately arises, what if there were a counterclaim? This would raise a real possibility of conflict of interest. The decision gives no assistance in resolving this problem, but it is one that companies writing this type of coverage will have to meet.

The court allowed the company to intervene. Does this mean that the company generally can expect to intervene? The court says, "For the reasons assigned, we believe that, *under the facts peculiar to this case*, the relator should be permitted to intervene as a matter of right."[3] And further, "What we have said and held is of course applicable only to this case, . . ."[4] and ". . . we express no opinion and intend no holding except as applied to the specific situation before us."[5] It is impossible to ascertain what will be the result in the next case involving this type of coverage.

Another notable case involving insurance proceeds and the doctrine of equitable conversion is *Skelly Oil Co. v. Ashmore*.[6] In this case after a contract of sale was executed but before closing, a building burned.[7] The court held that when a building is destroyed under these circumstances, and the building ". . . constituted an important part of the subject matter of the contract . . . the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he had not protected himself by insurance, he can have no reimbursement of this loss. . . ."[8] However, the court concluded that the defendant, who wanted the land, was entitled to complete the purchase with the insurance proceeds substituted for the destroyed building.

In closing real estate transactions, the very practical problem of dividing insurance expenses between buyer and seller will need some revision.

---

2. *Id.* at 346.
3. *Id.* at 349.
4. *Ibid.*
5. *Ibid.*
6. 365 S.W.2d 583 (Mo. En Banc 1963).
7. See 28 Mo. L. Rev. 641 (1963).
8. *Supra* note 6, at 589.

Since in case of loss, the proceeds of the policy may reduce the purchase price, it would appear that the person who is really being protected is the purchaser. Would it not then be proper to charge the purchaser with the insurance premium after the date of the contract?

Three cases arose from the financial troubles of insurance companies. In *First National Bank of Kansas City v. Higgins*,[9] plaintiff, a judgment creditor of the insured, attempted to reach the proceeds of a reinsurance policy issued in favor of an insolvent insurance company. The Superintendent of the Division of Insurance, as receiver of the insolvent company, asserted a claim to the reinsurance proceeds for the benefit of all creditors of the company. The Superintendent relied on a provision in the reinsurance policy which provided that "Payments under this Agreement shall be made directly to the Company or to its liquidator, receiver or statutory successor. . . ."[10]

There was disagreement as to whether the event insured against was an actual loss by the insured company, as when payment of a claim was actually made, or whether it was against liability to make a payment, without the necessity of a payment. The court pointed out that the agreeent was not drafted so as to make clear just which interpretation was proper. However, the court concluded that liability alone, and not loss, was insured against.

After deciding that the event insured against had occurred, the court was faced with two claims for the proceeds. Plaintiff argued that this was basically a third-party beneficiary contract for his benefit, while the Superintendent viewed the proceeds as additional assets of the insolvent company.

The supreme court, by a 4-3 decision, found for plaintiff, citing *Homan v. Reinsurance Corp.*[11] However, the *Homan* case was primarily concerned with the first question, that of indemnity against loss or liability. The question of payment to receiver or claimant was not really at issue there. This was pointed out by the dissenters.[12] The result reached by the majority seems more appropriate, however, since the fund in question owes its existence to the claim asserted by plaintiff. If it were not for his claim, there would be no fund, and other creditors of the insolvent insurance

9. 357 S.W.2d 139 (Mo. En Banc 1962).
10. *Id.* at 141.
11. 345 Mo. 650, 136 S.W.2d 289 (1940).
12. *Supra* note 9, at 150.

company are not being deprived of anything that they would normally have a right to reach in satisfaction of their claims.

The other two cases, *Clay v. Independence Mutual Ins. Co.*[13] and *Clay v. Eagle Reciprocal Exchange*,[14] illustrate the risk involved to the agent when an insurance company becomes insolvent. Briefly, the procedure to be followed in case of insolvency is this: After the Superintendent of the Division of Insurance is declared receiver of the company, all rights of the parties become fixed. The agent may not cancel the policies on his own initiative after business has been suspended, even though the agent has no notice of the insolvency and suspension. The *Independence* case also suggests, by way of dictum, that an agent has no authority to cancel a policy and rewrite the insurance with another company without a request from the insured, even while the company is doing business.

As a part of the gathering of assets of the company, all premiums due for the full term of the policies are collected and an agent holding premiums for the company must pay them to the receiver. When the receiver cancels all the policies of the company, the agent must then remit all the unearned commissions on the canceled policies. And the agent may not set off any amounts due him from the company, since this would give him a preference over other creditors. He must take his share of the assets, as must the policyholders who seek the return of their unearned premiums, after payment of liquidation expenses, taxes, and all matured policy claims.[15] Thus, insurance agents are faced with the possibility of loss to themselves in the event of insolvency of a company which they represent.

Insurance policies are drafted by skilled and experienced lawyers with the intent of avoiding litigation as much as possible. But even so, it has been necessary in several cases to litigate in order to determine whether a particular set of facts falls within or without the coverage of the policy. Some of the questions arising during the past year are:

1. What constitutes failure to "promptly . . . turn over" funds under a burglary policy?[16]

---

13. Clay v. Independence Mutual Ins. Co., 359 S.W.2d 679 (Mo. 1962).
14. Clay v. Eagle Reciprocal Exchange, 368 S.W.2d 344 (Mo. 1963).
15. § 375.700, RSMo 1959.
16. Consumers Money Order Corp. v. Pettit, 358 S.W.2d 422 (K.C. Mo. App. 1962).

2. Is a friend of the insured's son an additional insured when the evidence shows the son did not have authority to lend the car?[17]

3. Is a boy hired on a day-to-day basis to help in the hay harvest an employee?[18]

4. If a business building is not "open for business" is it vacant?[19]

Sometimes, however, the draftsman may slip. *Phillips Hotel Operating Co. v. Liberty Mutual Ins. Co.*[20] found the reverse of the old saw "The policy giveth and the endorsement taketh away." The policy itself provided no coverage for loss of guests' money or other property, but an endorsement extended coverage to property of guests left with the hotel for safekeeping. After certain valuable jewelry disappeared mysteriously from the hotel safe, the company refused to pay, claiming that the endorsement covered only burglary of guests' property, not mysterious disappearance. The court concluded that "no amount of weaseling"[21] would avoid the broader interpretation of the coverage.

Missouri appellate courts follow a consistent course of reasonable interpretation of policy provisions. When earlier cases are cited the courts generally treat them as persuasive, but unless the facts are identical, earlier decisions do not seem to dictate results. The attitude seems to be one of finding the right solution to *this* problem, but with little effort or intent to set down rules to govern all other similar cases. For example, in *Farm Bureau Mutual Ins. Co. v. Farmers Mutual Auto Ins. Co.*,[22] each side came into court with one case almost in point in its favor. The court made no particular effort to lay down guidelines for the bar, but only applied one of the two cases on the basis that the facts were closer. In the future, on a slightly different set of facts, this same controversy will probably be litigated again, this time with one side having two cases, the other still having one. It is interesting to note that of eight cases involving a single insurance company which denied coverage under a policy, the insured or claimant recovered in seven.[23]

---

17. MFA Mutual Ins. Co. v. Alexander, 361 S.W.2d 171 (Spr. Mo. App. 1962).
18. Farm Bureau Mutual Ins. Co. v. Farmers Mutual Auto Ins. Co., 360 S.W.2d 325 (St. L. Mo. App. 1962).
19. Limbaugh v. Columbia Ins. Co. of New York, 368 S.W.2d 921 (St. L. Mo. App. 1963).
20. 366 S.W.2d 54 (K.C. Mo. App. 1963).
21. *Id.* at 56.
22. *Supra* note 18.
23. It is sometimes amazing to see how far these decisions will go. In Johnson v. Kansas City Fire & Marine Ins. Co., 364 S.W.2d 68 (K.C. Mo. App. 1962),

One case should be of particular interest to lenders. In *Northwestern National Ins. Co. v. Mildenberger*,[24] a building owned by *R* was conveyed by a deed of trust to *T* as security for a debt of about $10,000 owed to *E*. The building burned, and a loss of $3,389.43 occurred. Before payment by the insurance company, *T* proceeded to sell the building, *R* being in default. *E* bought at the sale for the full amount of the debt plus costs of sale. Then both *R* and *E* claimed the proceeds of the policy. The company paid the amount into court and interpleaded both *R* and *E*. The policy contained a union mortgage clause for the benefit of *E*.

This was a case of first impression, but the court followed the decisions of other states in concluding that the insurance fund must be paid to *R*. *E* had three ways of recovering his debt. He could sell the property and apply the proceeds to the note; he could collect the insurance proceeds and apply them; or he could go against *R* on his personal obligation. But having satisfied the debt by one means he may not then pursue the others. The sale by the trustee for the full amount of the debt extinguished any obligation due *E* by anyone. Mortgagees should be advised that if they have any claim that will not be fully satisfied by owning the property *in its present condition*, this should be taken into account in making their bid at the sale. "It cannot seriously be contended that the mortgagee could have kept the insurance proceeds and also have recovered in full the payment of the debt owed to it."[25]

In spite of the considerable amount of litigation, both old and new, it is still possible to have a fact situation that is yet undecided by the courts. With the growing importance of insurance in the lives of all of us, it is hoped that Missouri courts will keep in mind the importance of each decision in planning future conduct by people all over the state. Each case is important to the litigants, but there is a wider audience that must be considered.

---

the company lost even though any casual reader of the decision will recognize the impossibility of a rainstorm coming through an open door to the basement and collecting 18 inches of water in the basement when the claimant's own testimony indicated that the basement drains were open.

24. 359 S.W.2d 380 (St. L. Mo. App. 1962).

25. *Id.* at 385.